THE
MADRAS LAW JOURNAL.

VOL.] SEPTEMBER, 1925. [XLIX

IS A PATTA A DOCUMENT OF TITLE ?

The decision in *The Official Assignee of Madras* v. *Badri Narayan Doss* (1) calls for more than a passing notice. By way of security for a loan, the insolvent had deposited a patta relating to some of his lands situated in the moffussil. As the deposit itself was made in Madras, it would have sufficed, in accordance with a long line of cases, to create a valid mortgage if the patta could be regarded as a " document of title " within the meaning of S. 59 of the Transfer of Property Act. [See *Madho Das* v. *Ram Kishen* (2), *Srinath Roy* v. *Godadhur Das* (3) and *Imperial Bank of India* v. *U Rai Gyaw Thu* (4)]. It is not clear from the judgment whether or not there were other title deeds relating to these properties. Their Lordships were, however, prepared to hold that a patta is a document of title, mainly on the ground that if they should hold that a valid equitable mortgage could not be created by depositing that piece of paper it would amount in many cases to a denial of the right to create an equitable mortgage.

To realise the exact scope and effect of the decision, it may be useful to refer briefly to the English Law on the point. In England, what are called equitable mortgages fall under three main heads : (1) Mortgages by equitable owners of their equitable rights, *e. g.*, mortgage of the equity of redemption or mortgage by a *cestui que trust* of his beneficiary interest; (2) an agreement to effect a legal mortgage. (Some decisions seem to treat the mortgage by deposit of title deeds as an agreement to effect a legal mortgage) ; and (3) the creation by legal owners of equitable rights in property by way of security. The mortgage by deposit of title deeds is generally

1. (1924) I L R 48 M 454 : 48 M L J 423.
2. (1892) I L R 14 A 238.
3. (1897) I L R [illegible] C 318.
4. (1923) I L R 51 C 86 : 45 M L J 505 (P C).

treated as falling under the last head. In this country the distinction between legal and equitable estates does not obtain. Arrangements falling under Class (2) are only treated as contracts capable of specific performance and possibly after the judgment of the Full Bench in *Vizagapatam Sugar Development Co., Ltd.* v. *Muthurama Reddi* (5), in the case of a usufructuary mortgage it may also be treated as a legal mortgage if there be transfer of possession by way of part-performance of the contract. A mortgage falling under Class (1) and a mortgage by deposit of title deeds are here regarded as legal mortgages.

We venture to think that in relying on the reasoning in certain English cases the learned Judges have, for the moment, lost sight of the distinction above adverted to. The English cases hold that to effect an equitable mortgage by deposit of title deeds, it is not necessary that all the deeds should be deposited, nor that the deeds deposited should show a complete or good title in the depositor, so long as the deeds deposited are material evidence of title and are shown to have been deposited with the intention of creating a valid charge. [See *Ex parte Wetherall* (6) and *Roberts* v. *Crofts* (7)]. This English view is followed in *Bhupendra Nath Basu* v. *Mt. Wajib-un-nissa Begum* (8), where Chapman, J. says : " There is no technical rule that in an equitable mortgage all the title deeds should be deposited. It is merely a matter of intention. " In the Madras case the learned Judges make a point of the hardship that may arise if it should be held that many a ryot, whose only document may be his patta, cannot create an equitable mortgage ; but let us look at another side of the question.

Under the English Law, when an equitable mortgage is pitted against a legal mortgage, the equitable mortgage yields place to the legal, unless the holder of the legal mortgage has done or omitted to do something which prevents him in equity from asserting his paramount rights. It is only when the question of priority arises as between two equitable mortgages that the maxim *qui prior est in tempore, potior est in jure* is applied. Notwithstanding this protection afforded to the legal mortgagee, the very Chancery Courts which had encroached upon the Common Law Rule " that the mere possession of

5. (1923) I L R 46 M 919 : 45 M L J 528 (F B).
6. (1805) 11 Ves 398.
7. (1857) 24 Beav 223.
8. (1917) 2 Pat L J 293 at 301.

title deeds gave the holder no interest in the estate itself, except collaterally, by giving him an interest in the title deeds alone," were loath to extend the exception further. [*See* Eldon, L. C. in *Ex parte Whitbread* (9)].

In India, a mortgagee by deposit of title deeds is not postponed to a legal mortgagee except where he has been guilty of fraud or gross negligence. The attempt to bring equitable mortgages within the postponement made by S. 48 of the Registration Act was negatived [*Webb* v. *Macpherson* (10), *Gokul Das* v. *Eastern Mortgage and Agency Co.* (11) and *Coggan* v. *Pogose* (12)] on the ground that in all these mortgages there is something more than "a mere oral agreement".

The result of the present decision will be that all mortgagees in the moffussil must insist on the patta being deposited with them. Even if they merely satisfy themselves by their production, they may bring themselves within the observations of Lord Kindersley in *Waldron* v. *Sloper* (13) "that a party coming into equity is bound to show that he has not been guilty of such a degree of neglect as to enable another party so to deal with that which was the plaintiff's right, as to induce an innocent party to assume that he was dealing with his own". In many cases, owners of lands in the moffussil do not take out pattas in their name, though they are entitled to do so at any time. If, in such a case, the mortgagee *bona fide* believes the mortgagor when he says that he has not taken out a patta, while, in fact he had taken out one and deposited it or intended to deposit it with another, does the doctrine of *Jones* v. *Smith* (14) that a false answer or a reasonable answer given to an enquiry made may dispense with the necessity of further inquiry apply ? Further, as pointed out by Lord Dunedin in *Imperial Bank of India* v. *U Rai Gyaw Thu* (4) "in parts of India remote from the enumerated towns it would be out of question to hold that there was a necessary duty in taking a mortgage to insist on the production of the title deeds. Registration is sufficient protection". It is difficult to see how the mortgagor's misrepresentation can affect a *bona fide* mortgagee. It is evident that by this rule the door is in some degree opened to fraud and perjury, and it may well be said,

4. (1923) I L R 51 C 86 at 100 : 45 M L J 505 (P C).
9. (1812) 19 Ves 202.
10. (1903) I L R 31 C 57 : 13 M L J 389 (P C).
11. (1905) I L R 33 C 410.
12. (1884) I L R 11 C 158.
13. (1852) 1 Drew 193.
14. (1841) 1 Hare 43 at 55.

in the words of Lord Eldon, that a creditor who will not be at the trouble of registering his mortgage or getting all the title deeds over the property, if he is desirous of having a charge on the debtor's estate, does not deserve much favour or sympathy. S. 59 of the Transfer of Property Act speaks of "documents of title" and does not say "some or material documents of title".

In England, this form of security was recognised only after the part-performance doctrine had been invented by the Equity Courts. We use the word "invented" as they were all really invented for the purpose of securing the better administration of justice. [*Re Hallet* (15)]. Lord Thurlow's reasoning in *Russell* v. *Russell* (16) seems to be that the delivery of title deeds is sufficient part-performance of an agreement to create a mortgage so as to take the case out of the Statute of Frauds [*see* also *Burgess* v. *Moxon* (17) and *Edge* v. *Worthington* (18)] and that the deposit gave the holder an interest over the lands covered by them and not merely in the title deeds. The result of holding that he had an interest in the title deeds was to give the holder of the title deeds a right to retain them with him till his money was paid and thereby restrain the legal owner from parting with his estate. In short, "the possession of the deeds gave him no direct interest in the estate, but only an interest arising out of the power of embarrassing the proprietor in the sale". The doctrine of part-performance was not recognised in this country, and in Madras, even after the Privy Council applied it in two cases in *Mahomed Musa* v. *Aghore Kumar Ganguli* (19) and *Venkayyamma* v. *Appa Rao* (20), the leaning against it was so great that the High Court refused to interpret the two Privy Council cases cited above as overruling the Full Bench decision in *Kurri Veera Reddi* v. *Kurri Bapi Reddi* (21) [see *Ramanathan* v. *Ranganathan* (22)]. It was only in 1923 that a Full Bench of the Madras High Court in *Vizagapatam Sugar Development Co.* v. *Muthurama Reddi* (5) overruled *Kurri Veera Reddi* v. *Kurri Bapi Reddi* (21) as no longer good law, after the two Privy Council cases above men-

5. (1923) I L R 46 M 919 : 45 M L J 528 (F B).
15. (1880) 13 Ch D 696.
16. 1 Bro C C 269.
17. (1856) 2 Jur N S 1059.
18. (1786) 1 Cox 211.
19. (1925) I L R 42 C 801 : 28 M L J 548 (P C).
20. (1916) I L R 39 M 509 : 31 M L J 58 (P C).
21. (1906) I L R 29 M 336 : 16 M L J 395 (F B).
22. (1917) I L R 40 M 1134 : 33 M L J 253.

tioned. Yet, the mortgage by deposit of title deeds, which, as we have shown above, was an offshoot of the part-performance doctrine in England has been recognised here from an early period, though the reason on which it was based in England was not followed. Not content with that, the decision under review tries also to incorporate the extensions of this doctrine in England.

We may point out here that a Bench of this Court (Krishnaswami Aiyar and Ayling, JJ.) struggled against this extension and held that the deposit by a son of a sale deed in favour of his father was not sufficient to create an equitable mortgage over those properties [see *Venkatramayya Pantulu* v. *Narasinga Rao* (23)]. Consistently with the English Law, we fail to see how the decision can be supported. Their Lordships no doubt found on the facts that there was an award granting these very properties to the mortgagor and they said that in the absence of the award on which alone the son's title to the property depended, they could not hold, that "the mere deposit of the sale deed in the father's name is a good deposit of the properties by the 1st defendant (mortgagor) so as to create a valid mortgage in favour of the plaintiff." In joint Hindu families, the properties descend from father to son by inheritance and there would be no separate deed of conveyance in favour of the son. To say in such cases that the document should show title in the depositor (son) would not be correct. Their Lordships' decision must be limited to cases where there are other documents directly showing title in him.

SUMMARY OF ENGLISH CASES

SMITH *v.* MARTIN, (1925) 1 K. B. 745.

Arbitration—Agreement to refer—Construction—Power of arbitrators to decide question of jurisdiction.

Under the terms of a building contract, the owner was to pay the contractor within a fixed time any sum certified by an architect and in default, the contractor was at liberty to put an end to the contract and recover all moneys due to him. It contained an arbitration clause that differences regarding the construction of the agreement should be settled by arbitration,

23. (1910) 21 M L J 454.

but such reference was not to be opened until the completion of the works. During the progress of the construction, the architect certified a sum for payment, and as the same was not paid in time, the contractor determined the contract and started arbitration proceedings. *Held,* the arbitration was premature, and could be begun only after the completion of the works.

Per Bankes, L. J.—Where a right to go to arbitration depends on the happening of an event, the arbitrator has no jurisdiction to decide if the event has happened.

PARKINSON *v.* COLLEGE OF AMBULANCE, LTD. AND HARRISON, (1925) 2 K. B. 1.

Contract—Illegality—Gift to charity—Agreement to purchase Knighthood—Failure to perform—Suit for recovery of money—If lies—Fraudulent misrepresentation.

The secretary of a charitable institution represented to the plaintiff that if he made a donation to the institution, he would undertake to procure him a Knighthood. Relying on the same, the plaintiff made a handsome donation to the charity, but did not get the promised honour, whereupon he sued the charitable institution and its secretary for return of the money or for damages for deceit or for breach of warranty. *Held,* a contract to guarantee or undertake that an honour will be conferred if a contribution is made is against public policy and therefore an unlawful contract to make ; and as the contract had an element of turpitude in it, the parties were *in pari delicto* and no action for damages could be maintained by the defrauded plaintiff. The plaintiff could not recover the money from the Charity or its Secretary either as money had and received or as damages because he would be disclosing or setting up a contract which was unlawful and which he had no right to make ; nor could he resile from the contract, abandon it or sue for the money on the ground the contract was executory.

GRAHAM *v.* GREEN, (1925) 2 K. B. 37 : 94 L. J. K. B. 494.

Income-tax—Betting—Transaction with bookmakers from private residence—Liability to tax—Income-tax Act, 1918, Sch. D.

A person who was in the habit of earning his livelihood by betting on horses at starting prices, making bets from his

private residence with bookmakers, without being himself a professional bookmaker, is not liable to pay tax on his earnings under Sch. D of the Income-tax Act, 1918. What he earns does not amount to "profits or gains" within the meaning of Case VI, nor can he be said to carry on a "vocation" within the meaning of Case II.

WEIR AND COMPANY *v.* MCVICAR AND COMPANY, (1925) 2 K. B. 127.

Partnership—Suit against—Appearance of defendant under protest—Denial of partnership—Trial of issue as to partnership—Rules of Supreme Court, O. 48 (a), R. 7.

In an action against a firm, a defendant who had been served as a partner entered appearance under protest in accordance with O. 48 (*a*), R. 7, of the Supreme Court Rules (*corresponding to O.* 30, *R.* 8, *Civil Procedure Code*) denying that he was a partner. He then took out a summons to have an issue whether he was a partner tried first and the hearing of the action stayed till it was over. *Held,* he was not entitled to claim it.

Per Atkin, L. J. : *Quaere*: If an unconditional appearance would amount to such an admission of partnership as would preclude him from afterwards pleading in the alternative that he was not a partner ?

VERELIST'S ADMINISTRATRIX *v.* MOTOR UNION INSURANCE CO., LTD., (1925) 2 K. B. 137 : 94 L. J. K. B. 659.

Insurance—Motor accident—Death of insured—Notice to be given "as soon as possible"—Construction of.

A person whose life had been insured in respect of injuries sustained while travelling in a motor car was killed in a motor accident in India in January, 1923. The insurance policy contained a clause that the insured or his legal representative should give notice of the accident or injury "as soon as possible after it has come to his knowledge." The legal representative came to know of the death within a month, but did not know of the existence of the insurance policy till January, 1924, whereupon notice of the claim was given to the Company immediately. *Held,* in deciding whether notice had been given "as soon as possible," a Court should take into consideration all existing circumstances, such as the available

means of the legal representative's knowledge of the policy and of the identity of the insurance company upon whom the claim was to be made. Under the circumstances, the claim cannot be rejected as made too late.

SIMPSON *v.* TATE, (1925) 2 K. B. 214.

Income-tax—Salary—Medical officer—Subscriptions to societies to keep in touch with latest advances in science—If a deduction—Income-tax Act, 1918, *Sch. E, R.* 9.

A medical officer, who was receiving a regular salary, joined certain professional and scientific societies so that by attending their meetings and procuring their publications he might keep abreast of the highest developments and knowledge of the day. He claimed to deduct from his assessable income the subscriptions paid by him to these societies as moneys "expended wholly, exclusively and necessarily in the performance of the duties of his office" under Sch. E, R. 9 of the Income-tax Act, 1918. *Held,* he was not entitled to do so.

THE KING *v.* SWANSEA INCOME-TAX COMMISSIONERS: *Ex parte* ENGLISH CROWN SPELTER CO., LTD., (1925) 2 K. B. 250.

Writ of prohibition—Income-tax—Assessment of—No appeal filed—Subsequent discovery of losses—Writ if lies.

A trading company was assessed by the General Commissioners of Income-tax on the basis of the average profits of the three preceding years. No notice of appeal was given, and long after the expiry of the appeal period, the company found that in respect of the year in question the business resulted in a loss. It was clear that at the time of the assessment or during the period allowed for preferring an appeal, it was impossible to ascertain whether there would in fact be a balance of profits. The assessee then obtained a rule *nisi* directed to the General Commissioners to show cause why *a writ of prohibition* should not be issued prohibiting them from enforcing the assessment. *Held,* (1) a writ of prohibition could only be issued where there is something done in the absence of jurisdiction or in excess of it and as the Commissioners had only acted in accordance with their statutory duty and not in excess of their jurisdiction, a writ could not issue; and (2) the duty of finding whether there was in fact loss or profit was cast on the Commissioners and not on the High Court.

In re CITY EQUITABLE FIRE INSURANCE CO., LTD., (1925) 1 Ch. 407.

Company—Directors and auditors—Duties of—Signing of cheques—Wilful neglect or default—What is.

Per Romer, J. (confirmed in appeal by Pollock, M. R., Warrington and Sargant, L.JJ.)—The directors of a company in the performance of their duties stand in a fiduciary relation to the company. To find out the exact scope of their duties, it is necessary to consider not only the nature of the company's business, but also the manner in which the work of the company is in fact distributed between the directors and the other officers. In discharging the duties of his office, a director must act honestly; he must also exercise some degree of skill and diligence. He need not exhibit in the performance of his duties a greater degree of skill than may reasonably be expected from a person of his knowledge and experience. Nor is he bound to give continuous attention to the affairs of the company. In respect of all duties that, having regard to the exigencies of business and the articles of association, may properly be left to some other official, a director is, in the absence of grounds for suspicion, justified in trusting that official to perform such duties honestly.

A director who signs a cheque that appears to be drawn for a legitimate purpose is not responsible for seeing that the money is in fact required for that purpose or that it is subsequently used for that purpose, assuming that the cheque comes before him for signature in the regular way, having regard to the usual practice of the company.

It is the duty of each director to see that the company's moneys are from time to time in a proper state of investment, except in so far as the company's articles of association may justify him in delegating that duty to others.

An auditor of a company has nothing to do with the prudence or otherwise of making loans with or without security. It is nothing to him how the business of the company is being conducted. His business is to ascertain and state the true financial position of the company at the time of the audit. This he has to do by examining the books of the company. He must make inquiries to see that the books themselves show the true position and unless he does this, the audit is an idle farce. His first duty is to examine the books not merely for the purpose of ascertaining what they do show, but also for the pur-

pose of satisfying himself that they show the true financial position of the company. He is not, however, bound to do more than exercise reasonable care and skill in making inquiries and investigations. He is not an insurer and does not guarantee that the books do correctly show the true position of the company's affairs ; he does not even guarantee that his balance sheet is accurate according to the books of the company. He must not certify what he does not believe to be true and he must take reasonable care and skill before he believes that what he certifies is true.

An act or an omission to do an act is wilful when the person knows what he is doing and intends to do what he is doing. Even if that act or omission amounts to a breach of duty and, therefore, to negligence, he is not guilty of wilful negligence unless he knows that he is committing, and intends to commit, a breach of his duty or is recklessly careless in the sense of not caring whether his act or omission is or is not a breach of duty.

Per Pollock, M. R.—The duty of an auditor is verification and not detection. He is a watchdog but not a bloodhound.

In re BARRATT : NATIONAL PROVINCIAL BANK, LTD. *v.* BARRATT, (1925) 1 Ch. 550.

Will—Construction—Gift of whole property to widow for life and then to children—Personal estate—If to be enjoyed in specie by widow.

A testator by his will bequeathed the whole of his property of every description to his wife for life and after her decease directed the estate to be divided among his children and grandchildren. He died possessed of personal estate consisting of household goods, furniture, etc. *Held,* the language of the will did not evidence an intent to exclude the operation of the rule in *Howe* v. *Earl of Dartmouth,* 7 Ves. 137 (*a*) and therefore the widow must enjoy it in specie and on her death alone could it be converted.

In re DUDMAN : DUDMAN *v.* DUDMAN, (1925) 1 Ch. 553.

Gift—Suicide of donor—Effect on gift.

Where a donor makes a gift at a time when she contemplates committing suicide and soon after commits suicide, the

gift is invalid. *Agnew* v. *Belfast Banking Co.*, (1896) 2 I. R. 204 followed.

In re COLLINS, (1925) 1 Ch. 556

Bankruptcy—Trade or business—Contracts for personal service—Moneys earned prior to and after bankruptcy—If vest in trustee—Mortgage of contracts prior to adjudication—Effect—Bankruptcy Act, 1914, *S.* 38 (*c*).

A person entered into a number of contracts for rendering personal services with the aid of assistants for remuneration to be paid after the services were rendered. He mortgaged these contracts and by arrangement with the mortgagee, the remuneration was to be received by the mortgagor and thereafter paid over to the mortgagee. The mortgagor became insolvent and on the date of adjudication some remuneration had become due in respect of services already rendered, while with respect to some other contracts the trustee in bankruptcy employed the bankrupt and his assistants to complete the contracts. On a question arising whether the mortgagee was entitled to these amounts, *held,* (1) as regards the amounts which had already become due in respect of services rendered prior to bankruptcy, they were due to the bankrupt "in his trade or business" within the meaning of S. 38 (*c*) of the Bankruptcy Act, 1914 [corresponding to S. 28 (3) of the Provincial Insolvency Act (V of 1920)] and being in his disposition with the consent of the mortgagee, the same vested in the trustee in bankruptcy; and (2) as regards the remuneration which was earned after bankruptcy, the mortgage could not be enforced as against the trustee.

MACAURA *v.* NORTHERN ASSURANCE CO., LTD., (1925) A. C. 619 : 94 L. J. P. C. 154.

Insurance—Company—Shareholder—Creditor—If has an insurabl interest in the assets.

Neither a creditor of a company nor a shareholder, even if he happens to hold all the shares in the company, has an insurable interest over the assets of the company.

ARAMAYO FRANCKE MINES, LTD. *v.* ECCOTT, (1925) A. C. 634 : 94 L. J. K. B. 688.

Income-tax—Company incorporated in England—Working mines abroad—Local Board of Directors abroad—Mine-

rals sold by agents in England—Assessment—Residence—Income-tax Act, 1842, *S.* 100, *Sch. D, Case I.*

An English Company carried on mining operations abroad and after a time the whole business was managed by a local board established at the place of mining. The minerals were sent to a firm of agents in England for sale. The local board was assessed to income-tax in the name of its English agents. *Held,* it was invalid, as the agents were only the agents of the Company and not of the Board of Directors. The Company, as it resided in England and carried on business through agents, could be assessed under Sch. D, Case I of the Income-tax Act. (1925) 1 K. B. 86 affirmed.

ALIANZA COMPANY, LTD. *v.* COMMISSIONERS OF INLAND REVENUE, (1925) A. C. 644 : 94 L. J. K. B. 684.

Corporation Profits Tax—Company—Residence in England—Trade wholly abroad—Liability to tax—Finance Act, 1920, *Ss.* 52, 53.

A Company which has its residence in England, but which is carrying on trade exclusively outside the United Kingdom, is nevertheless liable to pay Corporation Profits Tax under S. 52, Finance Act, 1920. The fact that it may not be liable to pay income-tax has no bearing on the question. (1924) 1 K. B. 870 affirmed.

SORRELL *v.* SMITH, (1925) A. C. 700.

Trade combination—Protection of trade interest—Conspiracy—Withdrawal of supplies—Intention to injure.

A union of news-agents in order to ward off certain other news-agents who had set up shops in their area without their permission requested the plaintiff, one of their own members, to withdraw his custom from the persons who supplied papers to the newcomers and transfer it to another. The defendants, a committee of newspaper proprietors, thought the action of the plaintiff's union was wrong and threatened to cause a discontinuance of the supply of papers to the persons to whom plaintiff transferred his custom. In doing so, the defendants were not actuated by spite towards the plaintiff but acted only to protect their trade interests. In an action for restraining the defendants, *held,* affirming the decision of the Court of Appeal in (1924) 1 Ch. 506 the action should fail, as no wrong had been threatened or committed against the plaintiff.

Per Viscount Cave.—A combination of two or more persons wilfully to injure a man in his trade is unlawful and if it results in damage to him is actionable. But if the real purpose of the combination is not to injure another but to forward or defend the trade of those who enter into it, then no wrong is committed and no action will lie, although damage to another ensues. This distinction is expressed by saying that in the former case there is no just cause or excuse for the action taken, while in the latter there is.

Per Lord Dunedin.—If a combination of persons do what if done by one would be a tort, an averment of conspiracy so far as founding a civil action is mere surplusage. The use of the words " legitimate " and " wrongful " criticised.

Every one has a right to conduct his own business upon his own lines and as suits him best, even although the result may be that he interferes with other people's business in so doing. An act that is legal in itself will not be made illegal because the motive of it may be bad. But even though the dominating motive in a certain course of action may be the furtherance of a man's own business or interests, he is not entitled to interfere with another man's method of gaining his living by illegal means which may be either means that are illegal in themselves or that may become illegal because of conspiracy where they would not have been illegal if done by a single individual. It is wrong to hold in such cases that conspiracy is a mere side issue instead of being the very gist and essence of the decision.

Per Lord Sumner.—The object or purpose of the aggressive action of combination is the principal thing to be considered, but both object and purpose are words standing in need of strict definition.

Per Lord Buckmaster.—A threat to do an act which is lawful cannot create a cause of action, whether the act threatened is to be done by many or by one. A combination to promote trade interest is not illegal without malice and the onus is not on the defendant to justify but on the plaintiff to prove that the act was spiteful or malicious.

Quaere.—Even if a wrong has been committed, whether plaintiff is competent to maintain the action ?

In re SCORER : BURTT *v.* HARRISON, 94 L. J. Ch. 196.

Will—Construction—Gift to " my brother and sisters of all I possess "—Gift to a class—" Securities "—Meaning of.

A testatrix who wrote out her own will gave " to my brother and sisters in equal shares all I possess in money and securities......." At the time of the will she had one brother and four sisters, but by the time of her death the brother and two of the sisters had predeceased her. *Held*, on a construction of the will, it was not a gift to *personae designatae* but a gift to a class and therefore the surviving sisters took the whole.

The word " securities " when used in an instrument means securities for money and not an investment such as stocks or shares other than debenture stock. But the will having been drawn up by a laywoman, it ought to be construed as including all investments.

GARRARD *v.* JAMES, 94 L. J. Ch. 234 : (1925) 1 Ch. 616.

Contract — Guarantee — Company — Performance of covenant guaranteed by Directors personally—Liability— Covenant ultra vires *the Company—Effect.*

The plaintiff wanted his son-in-law to be appointed the Manager of a Company and under an agreement advanced £1,500 to the Company, for which he was allotted 1,500 preference shares. The agreement with the Company was that whenever the son-in-law left the service of the Company, the Company would purchase the shares at par and accept a bill for amount drawn on them. Two of the Directors guaranteed that in default of payment by the Company they would be jointly and severally liable. The son-in-law left the service, whereupon the plaintiff claimed the amount from the Company and as they refused to accept the bill, he sued the Directors under their covenant. *Held*, though a covenant by a Company to purchase its own shares was *ultra vires* and illegal, the Directors were liable on their guarantee.

In re ELLIS : MYTTENACRE, *Ex parte*, 94 L. J. Ch. 239 : (1925) 1 Ch. 564.

Bankruptcy—Deed of arrangement—Non-assenting creditor—If can apply for enforcement of trust—Deeds of Arrangement Act, 1914, *S.* 23.

A creditor who does not assent to a deed of arrangement is not competent to apply for the enforcement of the trust or the determination of questions arising under the deed under

S. 23 of the Deeds of Arrangement Act. Under that section the only persons who can apply are the trustee, the debtor and the creditors who are entitled to the benefit of the deed.

ROLLS-ROYCE, LTD. *v.* SHORT, 94 L. J. K. B. 651.

Income-tax—Deduction—Double taxation—United Kingdom tax assessed on three years' average—Loss in Indian business for the period—Effect—Finance Act, 1920, *S.* 27 (1)

A Company which had its head office in the United Kingdom had a branch in India. For the year ending 5th April, 1921, it was assessed to income-tax in England, based on the average profits wherever made for the three years ending with 31st October, 1919. So also for the year ending 5th April, 1922, on the average profits for the three years ending with 31st October, 1920. For these three year periods, the Indian branch incurred losses, but for the income-tax years ending with 31st March, 1921, and 31st March, 1922, the basis for assessment under the Indian Income-tax Act being the amount of profits in the preceding twelve months, the branch in India was assessed to Income-tax and Super-tax. The Company claimed relief under S. 27 (1) of the Finance Act with respect to the same part of the income assessed. *Held,* they were not entitled to relief, since they were not liable to pay tax in the United Kingdom on the Indian income, as there was a loss on the average of three years.

CORDY *v.* GORDON, 94 L. J. K. B. 670 : (1925) 2 K. B. 276.

Income-tax—Gross salary—Payments for board, lodging, etc., deducted out of salary—Amounts varying according to cost of living—Tax payable on gross salary—Income-tax Act, 1918, *Sch. D, Case II, R.* 2 (1).

Where a person is paid a gross salary and is to pay back to his employers out of that in respect of board and lodging which he is bound to take out of them, not a fixed sum but a sum which varies according to the cost of living, he is bound to pay income-tax on his gross salary. The case is different where a man is paid a salary and in addition receives board and lodging, in which case he is assessable on his salary alone, and the saving secured to him by providing him with board and lodging cannot for purposes of income-tax be estimated and added to his salary.

JOTTINGS AND CUTTINGS.

Passengers alighting from Railway Trains.—The particular circumstances discussed in *Sharpe* v. *The Southern Railway* (*Times*, 24th ult.) have frequently arisen before, and there are a number of reported cases as to the position arising in law when a railway passenger alights from a train, which has come to a standstill at his station, but not so as to bring his particular carriage door opposite the platform. As Bankes, L. J. pointed out, it is essential to the passenger's cause of action that there should be the invitation on the part of the company, express or implied, to alight. In *Bridges* v. *North London Railway Co.* (L. R. 7 H. L. 213) it was doubted whether the calling out of the name of the station is an invitation to passengers, destined to that station, to alight. It was held, however, that the additional fact of a complete stopping and a remaining stationary for a considerable time constituted, with the calling out of the name of the station, evidence to go to the jury. On the other hand, in *Owen* v. *G. W. Railway Co.* (46 L. J. Q. B. 486) the porters' shouting out an "All change here !" did not afford evidence to go to the jury in the case of a passenger who, knowing that her carriage door was not opposite the platform, hastened to alight and omitted to call for assistance. *Robson* v. *N. E. Railway Co.* (2 Q. B. D. 85 : 46 L. J. Q. B. 50) demonstrates that where the passenger, in similar circumstances, is prudent enough to call and wait for assistance, but, assistance not being forthcoming, and the train appearing to be about to proceed, alights and is injured, there is evidence to justify the taking of the jury's verdict.

—*The Law Journal*, July 4, 1925, p. 611.

Advertisement and Argument.—The outside world is not disinclined to laugh at lawyers, so that we lawyers may legitimately criticise the proceedings of the outside world and congratulate ourselves upon any advantage we possess by virtue of our profession and training. Two contemporary matters suggest this reflection. The first is the series of interesting debates being conducted in the columns of the *Morning Post* by amateur advocates, *e. g.*, upon "Spiritualism," "Prohibition" and the "Failure of Feminism". Following the arguments of both sides with close attention, we have come to the conclusion that the gift of argument is not a natural one, and that either case, on any one of the moot points discussed, could have been put very much more forcibly, and would have carried

much more conviction, if it had been drafted, or at least "settled," by an impartial lawyer. To instance a detail: the controversialists all appear to lay too much stress upon and attach too much importance to their personal position and progress in the debate, matters entirely irrelevant to the dispute and not calculated to interest or persuade the large percentage of readers who compose the tribunal. The second contemporary event is the conference of Publicity Experts at Harrogate. Upon the merits or demerits of advertising, regarded in the wide extent which it has to-day attained, we venture no remarks. But, when we regard the expense of it and the inevitability of it now-a-days in any business undertaking, we may surely be thankful for the fundamental rule of our profession which saves us from it! It is a form of competition which, once begun, must always develop an increasing intensity. And the methods of it must necessarily conflict with our professional habit of exact truth and logic. Perhaps the two things go together, and it is because lawyers may not advertise that they remain able to argue effectively?

—*The Law Journal,* July 11, 1925, p. 630.

* * * *

The Wig.—When, in the course of last week's heat wave, the temperature in Court rose higher and higher, and the atmosphere became more and more moist, one at least of His Majesty's Judges said that he could stand his wig no longer, and, doffing it, told counsel that they were free to do the same if they wished. The heat wave passed: the atmosphere became normally dry; wigs were resumed, and to all seeming the incident was closed and forgotten. We know, however, of at least one distinguished lawyer who would have something to say in the matter, Sir Alexander Wood Renton, K. C., Treasurer of Gray's Inn; and, since he was once for a short time Editor of *The Law Journal,* we may presume to say it for him. The transient climatic extreme of last week was a modified, a very modified, illustration of the conditions in which the Judicature works in our tropical Possessions, where it is a much debated question: Need the wig be worn? Sir Alexander felt strongly that it should be; the majesty of the Law requires to be adorned to have its full effect. Accordingly, with tact but persistence, he prevailed upon his Judges in Ceylon to sacrifice their comfort in order to maintain their full dignity. One of the latter, Sir Walter Shaw, continued the altruistic practice in Singapore, when he was appointed

Chief Justice of the Straits Settlements ; and even the south-west monsoon, at its zenith, could never induce him to abandon it. Now, a man may be none the wiser or more just in a horse-hair wig than he is uncovered ; but Sir Alexander would, no doubt, contend that it is the institution and not the man which matters. We can advance no argument of logic in favour of the wearing of the wig, either at moments of extreme heat or at all. We can, however, confidently prophesy that our readers, if they apply the visual test for themselves on the next available occasion, will feel a sensible diminution of their respect for Justice upon the disclosure, which the removal of the wig instantly affords, that those who administer it are ordinary human beings like themselves, if somewhat over-decorated ! We are a practical nation, and this wig is not our least practical expedient.

—*The Law Journal*, August 1, 1925, p. 699.

* * * *

Libelling the Dead.—The controversy between Lord Gladstone and Mr. Peter Wright will incline most people to think that the honour of the dead, or at least of those so recently dead that smirching or smudging fingers can pain relatives, is not sufficiently protected by our law. The last authoritative case on the subject appears to have been *Rex* v. *Ensor* [(1887) 3 *Times* L. R.] before Mr. Justice Stephen. He then held that no prosecution lay for any defamation of the dead, however atrocious, unless the defamation by implication included the living, who would have their ordinary remedy. In thus laying down the law, he seems to have gone somewhat further than Lord Kenyon did in *Rex* v. *Topham* [(1791) 4 Term Rep. 126], when he acquitted the prisoner for a libel on a dead peer only because the indictment contained no indication that the libel was likely to create ill-blood or induce the surviving relatives to break the peace, etc. It is hard to conceive anything more calculated to make a dutiful son break the peace than a wanton attack on his dead father's honour. In *Broom* v. *Ritchie* [(1905) 6 Fraser 942] Lord Young gave it as his opinion that, in Scottish Law, a civil action lay at the instance of a widow or her children against persons who had slandered her deceased husband, but the case was decided on other grounds and his two colleagues did not agree with him. A civil action, with a cheque at the end as a solatium for outraged feelings, may be deemed less appropriate than a prosecu-

tion as a means of making the punishment fit the crime in such instances. The persons entitled to prosecute should be any near surviving relative who had actually known the deceased, and the defence of truth and publication in the public interest should be available as in ordinary prosecutions for libel of a living person. In his judgment, Mr. Justice Stephen observed that the dead "have no rights and suffer no wrongs"—a *dictum* which, if followed up, should expunge the offence of body-snatching from the statute-book. The reasons why body-snatching is against the law are exactly the same as those which would support a measure forbidding honour-smirching: the pain to surviving relatives and the unrest of the living at the prospect of posthumous and outrageous wrong unredressed by law.

—*The Law Journal*, August 1, 1925, p. 699.

* * * *

The Children Report.—The third report on the work of the Children's Branch, which has just been issued, is noteworthy for two features; the section which it contains on the "Scope and Character of the Juvenile Court," and its account of the working of the Probation System; and we should add a third: the style in which it is written and the manner in which it is produced. It is not always in a Blue Book that we find poetical quotations taken from a famous source and adapted to a new but quite ingenious use; but speaking of the large proportion of Borstal inmates who commit their first offences before the age of 16, the author of the Report quotes, in a sense that Wordsworth never intended,

> "Shades of the prison-house begin to close
> Upon the growing Boy."

Perhaps, if we may continue the quotation, it is too late to regain the "vision splendid," which in any case must "fade into the light of common day;" but how these shades may be dispelled or, to come down to plain language, how far the defects of early training can be counteracted by suitable treatment is one of the most valuable functions of the Juvenile Court. Facing another page we find quite a fascinating picture, "A Holiday Group," showing a party of girls on the sea shore, from a Reformatory, of course; but we are advancing in many directions, and it is pointed out that there are advantages in dropping the title "Reformatory for Delinquent Girls," and just calling it Eccles School for Girls, or whatever the place may be.

—*The Law Journal*, August 8, 1925, p. 715.

BOOK REVIEWS.

THE INDIAN COMPANIES ACT, 1913, by S. Kasthurirangachariar, B. A., B. L., High Court Vakil, Lawyer's Companion Series published by the Law Printing House, Madras. Second Edition, 1925.

We have great pleasure in acknowledging the receipt of a copy of this book Since the appearance of the first edition of this publication, numerous decisions have been given under this Act and the first edition which appeared in 1915 could not refer to many decisions under the Act. The usefulness of the book has been maintained by the original plan being adhered to and the references to all the cases English as well as Indian being noted in their appropriate places. It is needless to repeat that all the useful and available information on the subject has been given in the various appendices, as for instance, the Indian Companies Rules, Rules and Regulations made by the Government of India and by the Local Governments relating among others to the duties of Registrars of Joint Stock Companies and Auditors' Certificates. An additional feature of this edition is that the rules framed by the various High Courts and the Judicial Commissioners' Courts under S. 246 of the Act have been given *in extenso* in Appendix II. We should only add that no pains have been spared to make the work useful to all those having to deal with the law relating to Companies in India.

THE INDIAN EVIDENCE ACT, by Subodh Chandra Lahiri, Vakil, High Court, Calcutta.

This is a small book of 196 pages giving the Indian Evidence Act with commentaries referring to the important decisions under each section under suitable headings. The usefulness of this book consists in the ease with which it can be carried in one's pocket and referred to easily without having to wade through learned commentaries of great length. We hope it will be found useful as an annotated pocket edition of the Act.